IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SHAWN CREMEEN, MIKE MANGE, and DONNA J. ATCHLEY,	)	
Plaintiffs,	)	**CIVIL ACTION**
v.	)	**No. 04-2519-CM**
MICHAEL P. SCHAEFER, et. al,	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiffs bring this action claiming that defendants engaged in securities fraud and racketeering when they contrived and carried out a Ponzi scheme. Plaintiffs seek recovery for securities fraud under § 10(b) of the Securities Act of 1934, 15 U.S.C. § 78j(b); SEC Rule 10b-5; Kan. Stat. Ann. § 17-1268(a)-(b); and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962. The court previously ruled that plaintiffs failed to plead their claims against defendant Bank of America with the requisite particularity. Instead of dismissing plaintiffs' claims, however, the court granted plaintiffs time to conduct limited discovery. This matter is now before the court on Defendant Bank of America, N.A.'s Motion to Alter or Amend Judgment (Doc. 36). For the following reasons, the court grants defendant Bank of America's motion.

The Private Securities Litigation Reform Act ("PSLRA" or "the Act") severely limits a plaintiff's right to discovery once a party files a motion to dismiss. *See* 15 U.S.C. § 77z-1(b) (1997) ("In any private

action arising under this subchapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party."). "The 'Stay of Discovery' provision of the Act clearly contemplates that 'discovery should be permitted in securities class actions only after the court has sustained the legal sufficiency of the complaint.'" *SG Cowen Sec. Corp. v. U.S. Dist. Court for the N. Dist. of Cal.*, 189 F.3d 909, 912-13 (9th Cir. 1999) (quoting S. Rep. No. 104-98, at 14 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 693). If a complaint fails to satisfy the Act's heightened pleading standards, the court must dismiss the complaint. *See id.* at 913 (citing 15 U.S.C. § 78u-4(b)(3)(A)). "[F]ailure to muster facts sufficient to meet the Act's pleading requirements cannot," as a matter of law, "constitute the requisite 'undue prejudice' to the plaintiff justifying a lift of the discovery stay under § 78u-4(b)(3)(B)." *Id.* Otherwise, the purpose of the Act's heightened pleading standards would be defeated. *Id.* Moreover, the PSLRA stay of discovery applies to other claims arising from the same allegations as securities claims. *See Rampersad v. Deutsche Bank Sec. Inc.*, 381 F. Supp. 2d 131, 134 (S.D.N.Y. 2003). Were the court to hold otherwise, the discovery limitations of the PSLRA would be meaningless.

The plaintiff has the burden of showing undue prejudice. *See In re Odyssey Healthcare Inc. Sec. Litig.*, 2005 WL 1539229, at *2 (N.D. Tex. June 10, 2005). "Because the exception [to the discovery stay] only covers 'undue' prejudice, this harm cannot consist of disadvantage that is inherent in the stay itself, such as the possibility of dismissal when an amended complaint based on newly discovered facts might have survived." *Id.* (citing *In re CFS-Related Sec. Fraud Litig.*, 179 F. Supp. 2d 1260, 1265 (N.D. Okla. 2001)).

In this case, plaintiffs have failed to demonstrate that lifting the stay is necessary to prevent "undue prejudice." They have merely asserted that discovery is necessary because they require additional information or evidence "to supplement or withdraw claims as required to meet the necessary pleading requirements." Other courts have held that a plaintiff may not engage in any discovery for the purpose of discovering additional evidence or facts – even if such evidence would allow a plaintiff to satisfy the Act's pleading requirements. *See, e.g.*, *SG Cowen Sec. Corp.*, 189 F.3d at 912-13; *Medhekar v. United States Dist. Court*, 99 F.3d 325, 328 (9th Cir. 1996) ("Congress clearly intended that complaints in these securities actions should stand or fall based on the actual knowledge of the plaintiffs rather than information produced by defendants after the action has been filed."); *In re Odyssey Healthcare Inc. Sec. Litig.*, 2005 WL 1539229, at *2 ("Lead Plaintiffs straightforwardly admit that they seek discovery in order to add factual detail to their complaint prior to this Court's resolution of the pending motion to dismiss. That is exactly the circumstance Section 78(u)-4(b)(3)(B) is calibrated to prevent. Accordingly, the Court concludes that Lead Plaintiffs have not demonstrated undue prejudice. The motion to lift the discovery stay is therefore denied."); *In re CFS-Related Sec. Fraud Litig.*, 179 F. Supp. 2d at 1266 ("[A] plaintiff cannot seek a lifting of the PSLRA's discovery stay to obtain evidence to bolster its securities fraud allegations."); *Faulkner v. Verizon Commc'ns, Inc.*, 156 F. Supp. 2d 384, 406 (S.D.N.Y. 2001) (concluding "that the Complaint must stand or fall based on the allegations contained therein").

The court has reviewed the case that plaintiffs cite in their response, *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 354 F. Supp. 2d 357 (S.D.N.Y. 2005), and finds that it is not germane to the issues at hand. Plaintiffs' arguments are wholly unresponsive to those posed in Bank of America's motion to

reconsider, and the court will not address them further here.

A court will alter or amend judgment or reconsider its ruling when there is a need to correct clear error or prevent manifest injustice. *Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 948 (10th Cir. 1995); *Priddy v. Massanari*, 2001 WL 1155268, at *2 (D. Kan. Sept. 28, 2001). The court finds that Bank of America has made an adequate showing that it will suffer manifest injustice if the court permits discovery as provided in the court's August 10, 2005 Memorandum and Order. The court has reconsidered its previous order, and now holds that plaintiffs have failed to establish the "undue prejudice" required for the court to lift the stay of discovery in this action. The court vacates that part of its order allowing plaintiffs to seek limited discovery.

IT IS THEREFORE ORDERED that Defendant Bank of America's Motion to Alter or Amend Judgment (Doc. 36) is granted. For the reasons stated in the August 10, 2005 Memorandum and Order, Defendant Bank of America is dismissed from the case.

Dated this 7th day of December 2005 at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge